

EXHIBIT 5

1 Pages: 1-82
2 Exhibits: 26A
3 ID: J-L

4 COMMONWEALTH OF MASSACHUSETTS
5 HAMPDEN, SS SUPERIOR COURT DEPARTMENT
6 OF THE TRIAL COURT

7 *
8 COMMONWEALTH OF MASSACHUSETTS *
vs. * Docket No. 12-83
9 ROLANDO PENATE *
10 *

11
12 JURY TRIAL:
13 BEFORE THE HONORABLE TINA PAGE

14 APPEARANCES:

15 For the Commonwealth:
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By: Luke Ryan, Esq.

21 Springfield, Massachusetts
22 December 12, 2013

24 Elizabeth Marzano
Official Court Reporter
25

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1 (Court called to order)
2 (Defendant present)
2 (9:25 a.m.)

3

4 THE CLERK: Your Honor, we're back record in
5 Commonwealth versus Rolando Penate, Indictment 12-83, with
6 Attorneys Velazquez and Ryan. For the record, the
7 interpreter is present.

8 THE COURT: Good morning.

9 MR. RYAN: Good morning.

10 MR. VELAZQUEZ: Good morning.

11 THE COURT: Mr. Velazquez, you wanted to address the
12 Court?

13 MR. VELAZQUEZ: Your Honor, I did want to address the
14 Court, however, I spoke with one of the officers that I had a
15 question about and I had resolved it and I don't need to
16 address the Court at this point. I'm sorry.

17 THE COURT: That's okay.

18 MR. VELAZQUEZ: It happened just before you came on the
19 bench.

20 THE COURT: Not a problem. Now, is there -- do you have
21 any instructions you want to submit?

22 MR. RYAN: No, Your Honor. I killed a lot of trees in
23 this case, but I didn't kill any for the purposes of the
24 proposed instructions.

25 THE COURT: And I understand with respect to the verdict

1 slips, the dates will be on those verdict slips, correct?

2 MR. VELAZQUEZ: Yes.

3 THE COURT: Good. Have you gone through the exhibits
4 yet?

5 MR. RYAN: We have. There is one issue that I don't
6 quite know how to address, but I don't think it will be too
7 big a problem.

8 The identifications of Luis Vega were found with the
9 bullets. I know the bullets aren't going back given the
10 Court's ruling of the Rule 25 motion, but I think those
11 identifications are relevant, and I was hoping they could go
12 back as maybe as a separate exhibit. I don't know.

13 THE COURT: Do you have them?

14 THE CLERK: I do, Your Honor. For the record, that
15 would currently be Exhibit No. 26.

16 THE COURT: Okay. So, Mr. Velazquez?

17 MR. VELAZQUEZ: Your Honor, I do know that Luis Vega
18 Colon was one of the people that was arrested on that day in
19 the apartment. So the only thing of any evidentiary value in
20 that room, in that bedroom, is those two IDs that would come
21 in. I'm not sure if there is any drugs associated there.
22 I've kind of lost track.

23 THE COURT: No, this is Exhibit No. 26, these are the --
24 this is the ammunition that was found on the third floor
25 along with Mr. Vega's identification.

1 MR. VELAZQUEZ: Right.

2 THE COURT: And the identification and the bullets are
3 in the same small plastic bag which is contained in the
4 larger evidence bag. Mr. Ryan wants the identification to go
5 in as an exhibit sans the ammunition.

6 MR. VELAZQUEZ: Understood.

7 THE COURT: So what we could do is keep the
8 identification documents in as Exhibit No. 26, take the
9 ammunition out, and mark it for identification and the number
10 would say "previously No. 26."

11 MR. VELAZQUEZ: Right. Just a question, Your Honor, I
12 don't know what it says at the top, if it identifies
13 ammunition or anything.

14 THE COURT: Yup, it does. "Bullets in basement." This
15 says "bullets in basement with gun." Bag No. 2.

16 MR. VELAZQUEZ: There were originally two bags inside.

17 THE COURT: Inside this one bag, okay.

18 MR. VELAZQUEZ: May I suggest something?

19 THE COURT: Sure.

20 MR. VELAZQUEZ: Take the identification and mark them as
21 whatever that identification number is and add an A to it.

22 THE COURT: Perfect.

23 MR. RYAN: That's fine.

24 THE COURT: So Luis Vega's identification will be marked
25 as Exhibit No. 26A. Thank you, Mr. Velazquez.

1 MR. VELAZQUEZ: You're welcome, Your Honor.

2 THE COURT: This needs to go into a smaller envelope
3 because the small bag refers to the bullets also.

4 THE CLERK: 26A will be the IDs.

5 (The clerk remarks Luis Vega's IDs as Exhibit No. 26A)

6 THE COURT: Anything else?

7 MR. RYAN: Just a question in terms of how long we'll
8 have for our closings. I don't think I'll need more than a
9 half an hour.

10 THE COURT: That's what I was going to give you, 30
11 minutes apiece. Is that okay for you, Mr. Velazquez?

12 MR. VELAZQUEZ: That's fine.

13 THE COURT: Are you going to be referring to any of the
14 exhibits in your closing?

15 MR. RYAN: I am.

16 THE COURT: Do you have them?

17 MR. RYAN: Yes.

18 THE COURT: All right. So I think we are ready for the
19 jurors.

20 (The jury enters the courtroom)

21 THE COURT: Good morning, ladies and gentlemen.

22 THE JURY: Good morning.

23 THE COURT: Now, have any of you begun discussing the
24 case amongst each other or with anybody outside of the
25 courtroom? Seen, heard, or read anything about the case?

1 Taken any independent views or done any independent research
2 with respect to any of the issues that have developed during
3 this trial? Is there anything that needs to be brought to my
4 attention before we resume the case?

5 For the record, there is no affirmative responses to any
6 of the questions asked by the Court.

7 Ladies and gentlemen, when we began this case there were
8 three indictments that referenced firearms or weapons
9 charges. Those counts of the indictments will not be
10 considered by you during the course of your deliberations.
11 They are no longer a part of this case. So they were Counts
12 11, 12, and 13. They will not be considered by you during
13 the course of your deliberations. Is that understood? Thank
14 you.

15 We will now have closing arguments, and let me just
16 remind you that closing arguments are not evidence. It's the
17 lawyers' opportunity to sum up all of the evidence that's
18 been presented thus far. We reverse the order of closings,
19 and the defendant presents his closing argument first.

20 Mr. Ryan.

21 MR. RYAN: Thank you, Your Honor.

22 THE COURT: You're welcome.

23

24

25

1 CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

2 MR. RYAN: Two days ago at the start of this trial I
3 drew attention to the flawed process that led to the
4 misidentification of Shaina Lee Robles as the perpetrator of
5 a criminal offense. Make no mistake. The process that led
6 to the identification of my client as the Hispanic male
7 dealing drugs out of 57 Johnson Street is far more troubling.

8 Edwin Hernandez was shown this picture of Shaina Lee
9 Robles. He identified her as the young girl who took his
10 orders for drugs on November 9, 2011 despite the fact that
11 she was seven inches taller and some five years older than
12 the young girl he actually claims to have dealt with. This
13 evidence casts considerable doubt on Edwin Hernandez's
14 reliability as an eyewitness.

15 The evidence concerning my client's identification
16 doesn't simply undermine Officer Hernandez's reliability, it
17 all but destroys his credibility along with the credibility
18 of John Wadlegger, the lead investigator in this case.

19 Edwin Hernandez testified that John Wadlegger showed him
20 this photograph before and after each and every undercover
21 buy he made. John Wadlegger said the same thing before and
22 after each and every time.

23 Now, having heard all about the corners that John
24 Wadlegger cut during the course of this case, do you really
25 think he's the kind of officer who would have bothered to

1 show this same picture six times to a fellow officer?

2 The fact is, ladies and gentlemen, this picture was not
3 shown to Edwin Hernandez before or after any of the purchases
4 he made in the fall of 2011. It wasn't shown on
5 October 21st, it wasn't shown on November 9th, and it was not
6 shown prior to my client's arrest on November 15th. This
7 picture did not even exist until after my client's arrest.

8 How do we know this? The bottom of this photograph
9 provides a birthday 2-2-58. At the top there is an age, 58.
10 A man born on February 2, 1955 is 58 years old today. Back
11 in the fall of 2011, this man was 56 years old.

12 You want more proof that this photograph was never shown
13 to Edwin Hernandez? Take a look at Exhibit 13. During his
14 time on the witness stand, Sergeant Ambrose testified that
15 this photograph was a fair and accurate representation of my
16 client on the one and only day that he encountered him,
17 November 15, 2011, during the execution of the search
18 warrant.

19 When you go back to the jury deliberation room, you're
20 going to have both of these pictures, and I'd encourage you
21 to place them side by side. As you do, take note of the
22 shape of each shirt collar, in particular the crooked path it
23 takes in each picture under my client's chin. If you go
24 through the trouble of comparing these photographs, I am
25 confident that you will find that Exhibit 1 is a black and

1 white copy of Exhibit 13.

2 What does this mean? It means that the two most
3 important witnesses against my client offered false testimony
4 concerning the single most important issue in this case, the
5 identity of the Hispanic male who sold substances out of 57
6 Johnson Street.

7 This case is a whodunit, ladies and gentlemen, and Edwin
8 Hernandez is the only witness who said he saw my client do
9 anything. Now, if he had been shown this photograph before
10 and after encountering the Hispanic male, that would have
11 been problematic. A single picture popped up -- popped down
12 on his lap or pulled up on a computer screen by somebody like
13 Gregg Bigda, that's inherently suggestive. And when you have
14 a witness as suggestible as William Hernandez, this process
15 is tantamount to putting words in his mouth.

16 But pretending to have engaged in an identification
17 process that did not happen, that's beyond disturbing, ladies
18 and gentlemen. It's almost diabolical. How could police
19 officers do this sort of thing? Well, perhaps it's best to
20 consider what kind of police officers these are.

21 With a few exceptions like Sergeant Devon Williams, the
22 officers who testified in this case were members of a
23 Narcotics Unit. They don't spend their days walking, in
24 uniforms, the beat getting to know the people in the
25 neighborhoods. Narcotics officers dress in plain clothes.

1 They take on assumed identities. Day in/day out, they live
2 lives of make-believe.

3 Telling lies is not something they simply do to make
4 busts. It's something that they do in order to survive.
5 Nobody wants to believe a police officer sworn to uphold the
6 law would come into court and testify untruthfully. But in
7 this case, that's exactly what happened.

8 Now, the beauty of trials stems from the opportunities
9 that they provide to evaluate not just what witnesses say but
10 how they say it. Judge Page touched on this at the beginning
11 of this trial when she told you, cautioned you not to get too
12 caught up in note-taking.

13 If anybody were to ever read a transcript of this trial,
14 I doubt very much that they would comprehend what a truly
15 terrible witness Edwin Hernandez was. Right from the get-go
16 he had to refer to his reports to provide basic information
17 about this case. And even when he consulted these reports,
18 the accounts he offered were lacking in critical details.

19 What telephone number did he call to set up these deals?
20 What did the Hispanic male look like? How old was this man?
21 How tall? What was his build? Color of his hair? Did he
22 even have hair? On November 15, 2011, was he wearing a
23 bright yellow shirt?

24 At times you got the sense that Edwin Hernandez was not
25 recalling personal experiences but was attempting to recite a

1 script somebody else wrote for him. One example of this took
2 place when I asked him to confirm that it was dark at seven
3 o'clock at night on November 9, 2011.

4 This was not a trick question. Everybody in this
5 courtroom knows that by November, it's dark out at seven
6 o'clock at night. How long did it take Edwin Hernandez to
7 answer that question? When he finally acknowledged that it
8 was dark out, did you get the sense that he was testifying
9 from his memory or just trying not to sound stupid?

10 The one moment when Edwin Hernandez gave the impression
11 of a man telling the truth came when I asked him whether he
12 used drugs or alcohol during the course of this
13 investigation. Recall, if you will, the way he scoffed at
14 that notion and shook his head.

15 These were questions I had to ask to discover the source
16 of the many serious errors and mistakes he made. He did not
17 hesitate in answering these questions and his voice did not
18 betray any uncertainty.

19 Now, contrast these answers to the answer he gave to the
20 very last question I asked. That question asked him to admit
21 the possibility that he had mistakenly pointed the finger at
22 my client. Edwin Hernandez knew the answer that his script
23 required him to give, but he paused before giving it. And
24 when he said the words he knew he had to say, his voice was
25 devoid of any confidence or conviction.

1 Deep down, Edwin Hernandez isn't sure that my client is
2 the Hispanic male that sold him Exhibits 3, 4, and 5. He
3 knows that his errors led to the indictment of at least one
4 innocent person. And by the end of his testimony, he
5 appeared to harbor serious and reasonable doubts that his
6 actions led to a second individual being wrongfully charged.

7 What about Detective Wadlegger? One of the most
8 shocking moments in this trial came when I asked him about
9 the indictment of Shaina Lee Robles. Detective Wadlegger was
10 the lead investigator in this case, and it was absolutely
11 news to him that Edwin Hernandez misidentified Shaina Lee
12 Robles as my client's accomplice.

13 What does this say about this investigation? First, it
14 demonstrates an extreme level of carelessness. Detective
15 Wadlegger applied for a warrant for Shaina Lee Robles's
16 arrest based on two claims made by a rookie undercover cop.
17 Edwin Hernandez said that the Hispanic male in the driveway
18 told him to go inside and seek out his daughter Maria.
19 Suffice it to say, ladies and gentlemen, Maria and Shaina are
20 completely different names. And no evidence was offered
21 suggesting that my client had a daughter named Shaina.

22 The other thing Edwin Hernandez said is that when he
23 went inside, the young woman he thought was Maria said, "Mom,
24 hook him up" to Maria Colon. The warrant report that
25 Detective Wadlegger generated said that Maria Colon was not

1 Shaina Lee Robles's mom. Rosa Caramayo is the mother of
2 Shaina Lee Robles. In spite of this, Detective Wadlegger
3 went ahead and dragged this poor innocent woman into the
4 criminal justice system.

5 Detective Wadlegger's ignorance of Shaina Lee Robles's
6 innocence, even as of Tuesday morning, revealed something
7 else. It shows that in the world these officers live in,
8 this investigation wasn't a very big deal. If it was a big
9 deal, ladies and gentlemen, you wouldn't see errors like this
10 (indicating).

11 During the trial, the prosecutor attempted to explain
12 these conflicting numbers by eliciting testimony that
13 Detective Wadlegger's report contained a typo, and that the
14 officers had to count the money they seized by hand and
15 didn't have access to one of those fancy money counters that
16 bank tellers have.

17 Now, Mr. Velazquez is a talented advocate, and I have a
18 world of respect for him. In a case like this when he's
19 dealt lemons, he's very good at trying to make some lemonade.
20 But do these explanations make any sense? And was any
21 explanation offered as to how Detective Wadlegger came up
22 with that number, \$2,018, the figure that he provided the
23 Court in a, quote, true and detailed account he furnished?
24 How about an explanation for the mess he made in his police
25 report and search warrant regarding the number of bags of

1 narcotics found at the scene?

2 Want more evidence that in the eyes of the Narcotics
3 Unit this case wasn't worth any sort of detailed attention?
4 Think back to when Edward Kalish was on the stand. This is
5 the man that served as the evidence officer.

6 We were going through things that they were seeking to
7 establish control and occupancy at the premises. And at some
8 point I asked him whether a catalog addressed to an
9 individual at 57 Johnson Street might be evidence suggesting
10 a connection to that premises. Detective Kalish balked. He
11 balked at the idea that this would be something that any of
12 his officers would think to take. Why? Because catalogs are
13 too bulky to fit in the manila evidence bags.

14 So were catalogs found at the premises containing names
15 like Luis Vega Senior or William Cruz or Jose Ramos or Luis
16 G. Gordon? We don't know. Detective Kalish could not rule
17 this out. All he knew is if there were catalogs, officers
18 would have altogether ignored them. Is this a policy geared
19 towards removing reasonable doubt?

20 You might recall that during his time on the stand,
21 Detective Kalish acknowledged that officers had cell phones
22 and cell phones have cameras and they were present during the
23 execution of the warrant and photos were taken of the
24 surveillance system. Photos, incidentally, that have appear
25 to have disappeared.

1 But do these J. Crew or Eddie Bauer catalogs require
2 some sort of backbreaking effort to seize or create some kind
3 of unimaginable storage problem? Couldn't someone have taken
4 their phone out and taken a picture to document their
5 presence?

6 The absence of any pictures or video recordings is
7 really quite shocking if you step back and think about it.
8 Having listened to all of the witnesses, as the fact finders
9 in this case, how clear an image in your mind can you create
10 of what 57 Johnson Street looks like? Do you have a firm
11 grasp of the layout? Any sense of the lighting on that
12 second floor landing where so much critical action took
13 place? Where exactly in the pile of blankets in the dog pen
14 was thirteen bags of suspected heroin and ten bags or nine
15 bags of cocaine were discovered?

16 And speaking of evidence, why on earth wasn't this
17 evidence sent out to some lab for fingerprints or DNA
18 testing? The explanation that Detective Wadlegger offered
19 was pretty much the explanation a parent gives a child when
20 there is no good explanation to offer. Why don't you test
21 for trace evidence on these baggies? That's not something we
22 do, said Detective Wadlegger. Why not? Because we don't,
23 except in some cases but very rarely.

24 Now, at first blush, one has to admit that much of the
25 evidence against my client appears pretty damning. Damning

1 until you start to ask a couple of questions. Buy money was
2 found on his person, said Sergeant Ambrose. Well, where is
3 that buy money? It's been recycled. What was the serial
4 number of that buy money? We don't know. What was the
5 serial number of the buy money recorded in the logbook? We
6 don't know that either. And if this buy money was supposedly
7 found on my client, why is William Cruz listed as an owner of
8 it on an official Springfield Police Department report?

9 The defendant's name was on the mailbox, said Officer
10 Kalish. Well, did you take any pictures of that scrap of
11 paper on the mailbox? No. Was this scrap of paper listing
12 my client's name included in a search warrant describing
13 exactly where the number 57 was located?

14 Did Edward Hernandez, the eyes and ears of the
15 investigation, ever see this scrap of paper during his trips
16 into or out of the residence? How was it affixed to the
17 mailbox? How come there is not any tape on the back of it or
18 any signs that tape was ever used? How come it doesn't list
19 Luis Vega Junior, the occupant of the third floor bedroom, or
20 other individuals like Luis Colon who are getting their mail
21 there?

22 If the defendant's name was on the mailbox, how come
23 this one form letter to a Renaldo Penate Diaz is the only
24 letter that supposedly showed up during the search of the
25 residence? Who found this letter, by the way? Where was it

1 found? Is there a date on it? The list of things that could
2 have and should have been done in this case is staggering.

3 Officers observed a green Jeep Cherokee Grand in the
4 driveway. Officer Hernandez identified the man who sold him
5 substances as the owner of this vehicle. Did anybody get a
6 license plate to determine if Rolando Penate was the
7 registered owner?

8 A dog bit Officer Mitchell. Critical evidence was
9 discovered in a dog pen. Everyone agrees that the owner of
10 the dog would have been in a position to know about and
11 exercise dominion and control over contraband. Did anybody
12 examine the dogs' tags to determine the owner? When asked
13 this question, Detective Wadlegger claimed the dogs didn't
14 have any tags. However when this same question was posed to
15 Officer Hernandez, he admitted that they did.

16 Officer Hernandez used a cell phone to contact a man who
17 sold him substances. Presumably he dialed a number that he
18 or somebody else wrote down somewhere, and presumably the
19 work cell phone that Officer Hernandez used had a number.
20 Mr. Penate had a cell phone in his pants when he was
21 arrested. Did you hear any testimony that the number for the
22 phone that Mr. Penate had on him was the same number as the
23 one Officer Hernandez called? Were phone records introduced
24 showing that calls between Officer Hernandez's phone and this
25 phone on the dates that Officer Hernandez said contact

1 occurred?

2 Did anybody talk to the downstairs tenants or the owner
3 of the property to see if Mr. Penate was on the lease or
4 lived there?

5 Wouldn't it have been nice to hear at least from one
6 civilian prosecution witness in this case? How hard would it
7 have been to produce this evidence? Not very hard at all.
8 Why not produce such evidence?

9 Well, there are only two answers and neither reflecting
10 well on the officers involved in this case. Either they were
11 too lazy to do their jobs or they knew that if they did their
12 jobs it would produce evidence that would be helpful to the
13 defense.

14 Now, when I sit down and Mr. Velazquez stands up, I
15 expect he will draw attention to an item that is currently in
16 Mr. Penate's wallet, an identification card belonging to
17 Maria Vega. Nobody testified as to it being present in the
18 wallet when it was seized. So I think you can and should be
19 somewhat skeptical as to how and when it ended up there.

20 At the end of the day, I would suggest that the
21 probative value of this evidence is extremely limited.
22 Nobody is suggesting that Rolando Penate is a complete and
23 total stranger to 57 Johnson Street or its occupants. He was
24 there, after all, the day that officers executed the search
25 warrant.

1 The fact is, if you believe Officer Hernandez, the man
2 he met on the driveway on November 9, 2011 told him to go
3 inside and see his daughter Maria. During his direct
4 examination, Officer Hernandez attempted to tow the party
5 line by pretending that this man said my wife Maria. He did
6 this in an effort to support Detective Wadlegger's
7 unsubstantiated claim that my client was married to Maria
8 Colon even though Maria Colon's arrest report indicated that
9 she was single. Once he was asked to consult his November 9
10 undercover buy report, Mr. Hernandez conceded that the man in
11 the driveway referred to a daughter named Maria, not a wife.

12 Later on in his testimony Officer Hernandez acknowledged
13 that my client is not Maria Vega's father. He said that
14 Maria Vega's father is a man by the name of Luis Vega, the
15 man who happens to be the father of Luis Vega Junior, whose
16 identifications were found on the third floor, and Carlos
17 Vega, the young man that followed the police and had a
18 registration for a Dodge Caravan at the address.

19 These are cold hard facts, ladies and gentlemen. And at
20 the end of the day, the prosecutor is going to ask you to
21 overlook these cold hard facts and engage in a game of
22 speculation. Ultimately, I think we can all agree that if a
23 picture of Sasha Obama was found in his wallet, it would not
24 make Mr. Penate the president.

25 The critical question to ask is this: Was Edwin

1 Hernandez ever shown a photograph of Luis Vega Senior? Why
2 not? Wouldn't it be nice to know that this was not the man
3 that Officer Hernandez dealt with? What about William Cruz?
4 Why didn't anybody show his identification photo recovered at
5 the address to Officer Hernandez?

6 During the two occasions that Officer Hernandez
7 testified that he bought directly from this Hispanic man, he
8 said that the Hispanic man had drugs on his person. In other
9 words, he didn't have to go to a dog pen or anywhere else to
10 procure the drugs that he sold.

11 When the police executed the warrant, it is an
12 undisputed fact that my client did not have any contraband on
13 him. But William Cruz did. Ten bags of heroin were found in
14 his pockets. And as I said before, the police report
15 indicates that he was the owner of the buy money.

16 Now, throughout this closing I've been referring to the
17 substances seized as cocaine or heroin, and that happened
18 during the course of the trial as well. I've done this
19 because it's a lot easier to say cocaine or heroin than it is
20 to say tan or white powders suspected of containing
21 controlled substances as defined in Chapter 94C of the
22 General Laws of Massachusetts.

23 But at the end of the day, the fact that officers think
24 they've seized cocaine or heroin really doesn't amount to a
25 whole lot. These substances have to be sent out for forensic

1 analysis to see if the officers' suspicions are correct.

2 As William Hebert and Rebecca Pontes acknowledged,
3 sometimes the suspicions of law enforcement are unfounded or
4 at least can't be confirmed. Testing sometimes reveals that
5 substances that may appear to be illicit narcotics are really
6 something else.

7 Now, of course Mr. Hebert testified that all the samples
8 he analyzed contained control substances. The problem is
9 that William Hebert is not the first chemist to whom these
10 substances were entrusted. When Kevin Burnham dropped off
11 these items at the lab in Amherst, they fell into the hands
12 of woman now under indictment for tampering with substances
13 alleged to be cocaine or heroin. This undisputed stipulated
14 fact is a great big elephant in the room, and it's an
15 elephant that deserves some consideration in the jury
16 deliberation room.

17 Now, as I begin to conclude my remarks, it may occur to
18 you that there is something kind of odd about the fact that
19 I'm up here as the first attorney to speak to you. Up until
20 this point in the trial, the prosecutor has always gone
21 first. He got to make the first opening statement, create an
22 impression about this case in your minds. He got to call the
23 first witnesses and be the first attorney to question them.

24 Now that we're at the end of the trial, I've been thrust
25 into the position of going first. That means that whereas

1 Mr. Velazquez can comment on things that I've said, I'm not
2 going to be able to make any comments or offer any rebuttal
3 to any of his remarks no matter how much I might disagree
4 with them.

5 Now, in the course of your lives, I am sure that you
6 have all been in arguments and everybody knows that in an
7 argument, everybody wants to have the first word and
8 everybody wants to have the last word. And those are things
9 that Mr. Velazquez gets to have in this argument that we've
10 been having.

11 Now, as much as I might not like this, it's the way our
12 system works, and I have to concede that it makes a certain
13 amount of sense. The prosecutor gets the first word and the
14 last word because he has the burden of proof, as Judge Page
15 has told you throughout this trial. Mr. Penate doesn't have
16 to prove anything. He's presumed innocent and must be found
17 not guilty unless and until the prosecution proves him guilty
18 beyond a reasonable doubt.

19 Now, once Mr. Velazquez finishes his closing argument,
20 Judge Page is going to instruct you on the law. Among other
21 things, she's going to tell you that our system does not
22 permit people to be found guilty of crimes simply because
23 they associate with people who commit them.

24 There is no question that Rolando Penate associated with
25 people who were engaged in criminal activity back on

1 November 15, 2011. But there is no evidence that he did
2 anything more than associate with them.

3 At the end of the day, in order to convict my client,
4 you're going to have to do something that you promised not to
5 do during the jury selection process. Back on Monday, the
6 judge asked all of you whether you could treat the testimony
7 of police officers the same way you would treat the testimony
8 of any other witnesses. In order to become jurors in this
9 case, you had to promise that you would not credit the
10 testimony of police officers simply because they are police
11 officers. The only request my client, Rolando Penate, has is
12 that you keep that promise. If you do, I'm confident that
13 you will find him not guilty. Thank you.

14 MR. VELAZQUEZ: May we approach, Your Honor?

15 THE COURT: Yes.

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1 (The following conference was held sidebar)

2 MR. VELAZQUEZ: Your Honor, I take issue as to
3 Mr. Ryan's comment about a wallet that was at the police
4 station where a photograph mysteriously showed up, and it
5 suggested that maybe the Commonwealth had something to do
6 with putting it in there.

7 And I will tell the Court that I know that Mr. Ryan has
8 been to the police station to view all of the physical
9 evidence. He spent hours, I guess, and whether he missed
10 that photo or not is something I don't know, but certainly
11 it's something that we both saw yesterday when we were
12 looking through it or at least when I was looking through it
13 and I showed him.

14 THE COURT: And the wallet is in evidence?

15 MR. VELAZQUEZ: Yes.

16 THE COURT: So as you were looking through the wallet,
17 was it the first time that you saw it?

18 MR. VELAZQUEZ: First time I saw it.

19 MR. RYAN: First time I saw it too was yesterday.

20 THE COURT: All right. Well, the thing is, even though
21 it's an exhibit, there was no -- and that's what he brought
22 out was there was no testimony with respect to the wallet.

23 You know, Mr. Velazquez, I am going to reiterate during
24 my charge that closings aren't evidence and they have to rely
25 on the exhibits and the testimony that was presented during

1 the course of this trial. Is there anything else you would
2 want me to do --

3 MR. VELAZQUEZ: Well --

4 THE COURT: -- with respect to that issue?

5 MR. VELAZQUEZ: With respect to that issue, no. That
6 would suffice, Your Honor.

7 There was also a comment made in -- his comment made in
8 his closing about the police failing to look into the phone
9 to determine whether the phone number had been called. Now,
10 there was a police officer who was ready to testify as to
11 what their findings were, however, it was objected to by the
12 defense and sustained by the Court. So it's kind of
13 disingenuous, if you will, to now say they didn't do
14 something which they, in fact, did.

15 THE COURT: Mm-hm.

16 MR. RYAN: Your Honor, the reason it was objected to is
17 the officer was not going to be testifying to any firsthand
18 knowledge. It was something he read in the undercover
19 report.

20 THE COURT: That was my understanding that the basis of
21 the objection was hearsay. The officer that actually
22 determined the phone number wasn't here to testify and
23 that --

24 MR. VELAZQUEZ: But it suggests something that wasn't
25 done when counsel knows that, in fact, it was done and that

1 is dishonest, in my opinion.

2 THE COURT: Well, your opinion is noted. I'm not going
3 to make any comments with respect to that. Was the officer
4 who actually looked into the phone available to testify?

5 MR. VELAZQUEZ: I'm not sure.

6 THE COURT: Okay.

7 MR. VELAZQUEZ: But it doesn't change my objection to
8 his comments.

9 THE COURT: All right. Your objection is noted.

10 MR. VELAZQUEZ: Thank you.

11 (Sidebar conference concluded)

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1 MR. VELAZQUEZ: May I proceed, Your Honor?

2 THE COURT: Yes.

3 MR. VELAZQUEZ: Thank you.

4 CLOSING ARGUMENT ON BEHALF OF THE COMMONWEALTH

5 MR. VELAZQUEZ: Good morning.

6 THE JURY: Good morning.

7 MR. VELAZQUEZ: Members of the jury, I told you a couple
8 days ago, generally speaking, what I expected the evidence
9 was going to be in this case. And I guess I could have
10 probably made it easier by just calling Officer Hernandez and
11 have him testify that on three occasions he bought heroin or
12 at least he bought two bags of white powder which he thought
13 to be heroin from the gentleman seated in the middle here,
14 Rolando Penate. But that would not be a total picture for
15 you as jurors. And it's only fair to Mr. Penate that you
16 knew everything about this case, the good, the bad, and the
17 ugly.

18 Edwin Hernandez was a rookie cop. There is no changing
19 that. Edwin Hernandez had gone through his first undercover
20 experience. There is no changing that. Did he appear
21 nervous on the stand. You can all judge that from what you
22 see.

23 And I think that even the most experience police
24 officers, even lawyers get nervous whenever they address a
25 group of people. But you couple that with the fact that

1 these incidents happened over two years ago and people are
2 asked to testify to their best memory.

3 And occasionally you saw Officer Hernandez ask if he
4 could be permitted to read his report so that he could
5 refresh his recollection, if you will. And, of course, I
6 don't know how many times any of you have read something
7 under circumstances that might be considered duress, if you
8 will, read it fast, answer the question, people are waiting
9 to hear your response.

10 But if anything comes back to you after his testimony
11 about those three encounters at 57 Johnson Street, I ask you
12 to think about why he would say that he went to this address
13 and bought from that man seated in the chair right there on
14 three different occasions? What's his motive? What's his
15 motive to make that up?

16 The suggestion is that he was mistaken because he was
17 mistaken about the young woman that he bought from. And you
18 will have both of these photographs with you in the
19 deliberation room. You'll have an opportunity to look close
20 and see if there is any similarities, if on one chance
21 encounter you might make the same mistake that Officer
22 Hernandez made in terms of identifying this woman in Exhibit
23 2 as really the woman in Exhibit 6.

24 But he also told you that when he next saw her in person
25 in court some time later, he realized that he had made a

1 mistake and for that woman in Exhibit No. 2, Shaina Lee
2 Robles, it was a huge mistake and she had to endure whatever
3 she endured during the period of time before he realized it.

4 But what did he do? He owned up to it and he said
5 that's not the woman that sold me those drugs when he saw her
6 in person, and that case went away. So he was willing, at
7 that time, to say he made a mistake. He had to admit it here
8 because it's a fact. It's a fact that we can't change. But
9 he stood firm on the fact that the person that sold him two
10 bags of heroin on each and every one of those days was
11 Rolando Penate.

12 Now, how do we know it's heroin? Well, we're relying on
13 three things here. One is the police officers' observations
14 of what, in their experience, looks like heroin. That's not
15 enough.

16 We're relying on the chemist who told you under oath
17 that based on his tests of all of these items, that came back
18 to heroin or cocaine, notwithstanding the fact that they may
19 have been tested by somebody else. But he made it a point to
20 tell you that he tested only the items that were not tested.
21 And that still to this day those items that were submitted by
22 the police on November 15th or on those two separate dates
23 that the undercover buys took place were heroin or cocaine.
24 That hasn't changed.

25 And there is a third reason that you should believe it

1 was heroin, because Edwin Hernandez called this man and asked
2 him if he could come over and buy some heroin, and this man
3 gave him heroin in return for money. So he's also vouching
4 for this -- these items from the street.

5 So that in the very beginning, he was the one that
6 called it heroin, the police officer recognized it as heroin,
7 and the chemist confirmed it was heroin. But ultimately it's
8 your job to determine if it's heroin or not.

9 This was introduced as Exhibit 11, and you'll have it in
10 the jury deliberation room. Inside this wallet was found a
11 photograph, and you will have an opportunity to look at it
12 and you may not have heard testimony about this but it's in
13 evidence. You take it with you.

14 This is a photograph with words on it S.A.F.E. High
15 School Berkshire Avenue Campus Maria Vega. It may or may not
16 be the same person. You are the ones that make this
17 determination. But this was found in Rolando Penate's pocket
18 in his wallet.

19 There is no claim that that's not his wallet. There is
20 only a claim that maybe this wasn't there, somehow it
21 miraculously appeared in his wallet. And I think the
22 reference to the young Obama woman, I'm not even going to
23 touch on that.

24 The fact is, ladies and gentlemen of the jury, this is a
25 wallet that he carried with him on that day. He was present

1 in the apartment on that day. It's the Commonwealth's
2 position that he was present on October 21, 2011, on
3 November 9, 2011, and on November 15, 2011. And on those
4 days, he sold heroin to an undercover police officer. Either
5 he or somebody at his disposal: Go see Maria upstairs, my
6 daughter, or whatever he said.

7 This is the Maria that we're talking about as his
8 daughter, and that Maria referred to her mother: Ma, hook
9 him up. And the woman seated eating, as Officer Hernandez
10 said, pulled two bags of heroin from her lap and gave them to
11 him in exchange for \$20.

12 There was a lot of drugs in this case and a lot of drugs
13 that were found on various people throughout this apartment.
14 And as part of a presentation to you so that you can get a
15 true picture of everything that went on during this
16 investigation, you were told about the woman that came down
17 the stairs with heroin or items inside her bra with \$1,700 in
18 cash.

19 And that, by the way, is not involved in this case
20 because it wasn't found on Mr. Penate. Or the woman that has
21 been referred to as his wife, Maria Colon. Those are the
22 only two items that were presented in this case. The cash is
23 there, you have an opportunity to count it, and you take into
24 account all of what Detective Wadlegger and everybody else
25 said, Detective Kalish.

1 There are things that I may find important and you may
2 not, but the defense has suggested a number of things and one
3 of the things that counsel has talked about and made a real
4 big issue about is there is nothing to connect Rolando Penate
5 to this address. And I say to you what more than his
6 presence?

7 The judge is not going to charge you and say Rolando
8 Penate must live at this address in order to be considered
9 guilty of selling drugs from this address. That's not an
10 element. He could have been a passerby, somebody who just
11 happened to be there on these three dates.

12 The issue here is not whether he lives there or whether
13 the correct spelling of a document that went to his address
14 and it's Penate Diaz versus Rolando Penate. That's just
15 evidence that, sort of, adds to what other officers have
16 said. But the important thing is that he was present and
17 that he's been identified as a person who sold it.

18 The drugs inside the pen and the fact that there is dogs
19 with or without collars in order to determine whose drugs
20 those are, what you have is an apartment full of drugs and
21 people with drugs on them.

22 And it's not our position that all of those bags that
23 have drugs in somebody's pocket, in somebody's bra, in
24 somebody's purse or some other woman's purse, we're not
25 asking you, from the Commonwealth's point of view, to

1 consider those drugs in terms of his possession with intent
2 to distribute. Specifically what I'm asking you on the
3 Commonwealth's behalf is that on November 15, 2011 there was
4 drugs inside the house.

5 And by the way, these drugs that were found in the dog
6 pen were found there. Nobody claimed ownership to them.

7 But we do have a police officer who had just finished
8 leaving there and telling you that Mr. Penate sold to him on
9 that day inside that apartment. So what I'm asking you is to
10 consider those drugs as his intent to distribute.

11 And the rest of the information that you got in this
12 case I'm asking you to consider is part of the larger picture
13 that this was an operation for dealing drugs. There was
14 people everywhere, there was surveillance cameras facing
15 outside of this house. There were people in the neighborhood
16 yelling "guardia," yelling things to folks and you can only
17 assume to people in the house that the police are coming.

18 So if there are drugs in this pen, obviously it doesn't
19 belong to the dogs. Somebody must have thrown them there
20 when they heard folks yelling "police."

21 We could stand here and I can talk about all of the
22 things that the police did not do in this case, and sometimes
23 I think that point is really well taken. But have you ever
24 lost an item or misplaced an item and you look for it and you
25 find it someplace that you were at some point during the day?

1 Your job is done once you find whatever it was, your
2 glasses, your pen, your wallet. You don't continue looking
3 for things or evidence to support why you left it there or
4 who may have had something to do with putting it there, but
5 certainly you found it and your search ends.

6 We have the person who sold on those three dates. You
7 can mess around with the numbers on the board, mess around
8 with all of the things that the police didn't do or may have
9 done better. The identification, I think, is certainly
10 important because we don't want to send an innocent away.
11 But you are the ones that, sort of, connect the dots here.
12 That is your job.

13 And you're the ones that have to assess the credibility
14 of all of those witnesses. You may believe one and not
15 believe any of them, all the rest. But certainly is there
16 enough here to satisfy your judgment that Rolando Penate sold
17 on those three occasions and possessed cocaine and heroin
18 with the intent to sell it on November 15th? Thank you.

19 THE COURT: Thank you, Mr. Velazquez. We're going to
20 take a short recess and then when we come back, I will give
21 you the charge.

22 (The jury leaves the courtroom)

23 (Court recessed at 10:19 a.m.)

24 (Court reconvened at 10:42 a.m.)

25

1 JURY CHARGE

2 THE COURT: All right. Ladies and gentlemen, you are
3 about to begin your final duty which is to decide the fact
4 issues in this case. Before you do that, I'm going to
5 instruct you on the law.

6 It was obvious to me throughout this trial that you paid
7 close, careful attention to the witnesses as they testified
8 and to the lawyers as they questioned the witnesses. I am
9 now going to ask you to pay that same close, careful
10 attention to me as I instruct you on the law.

11 First let me just underscore the importance of this
12 case. To the Commonwealth and to Mr. Penate, this is the
13 most important case in the United States today. This is
14 their day in court, and that's how I want to begin my charge
15 to you, to emphasize how important this case is both to the
16 Commonwealth and to the defendant.

17 My function as the judge in this case has been to see
18 that this trial was conducted fairly, orderly, and
19 efficiently. It was also my responsibility to rule on what
20 you may consider as evidence and to instruct you on the law
21 that applies to this case.

22 It is your duty as jurors to accept the law as I state
23 it to you. You should consider all of my instructions as a
24 whole. You may not ignore any instruction or pay special
25 attention to any one instruction. You must follow the law

1 whether you agree with it or not.

2 I assure you that this is not my law that I made up
3 specifically for this case. There are two higher courts here
4 in the Commonwealth, the Appeals Court and the Supreme
5 Judicial Court. These courts guide every trial judge. They
6 establish and interpret the law for trial judges to use when
7 I instruct juries.

8 I am going to read the charge to you. I do that to make
9 sure that I'm accurate when I instruct you on the law. You
10 should not be concerned about the wisdom of any rule of law
11 that I give you. Whatever your private opinions are about
12 what the law is or ought to be, it is your duty to base your
13 verdict on the law as I define it to you.

14 If I take a bit more time discussing a particular
15 charge, please don't pay any attention to the length of my
16 instruction. Some matters may take longer to explain but
17 that is not a guide to their relative importance and is not
18 an indication that I have any opinion on any issue in this
19 case.

20 It was the duty of both lawyers to object when the other
21 side offered evidence which that lawyer believed was not
22 admissible under our rules of evidence. They also had an
23 obligation to ask to speak with me at the sidebar at the
24 judge's bench about questions of law which the law requires
25 me to rule on outside of your hearing.

1 Again, the purpose of such objections and rulings is not
2 to keep relevant information from you. In fact, it's just
3 the opposite. They are to make sure that what you hear is
4 relevant to this case and that the evidence is presented in a
5 way that gives you a fair opportunity to evaluate its worth.

6 You should not draw any inference, favorable or
7 unfavorable, to either attorney or his client for objecting
8 to proposed evidence or asking me to make such rulings. That
9 is the function and the responsibility of the attorneys here.

10 Your function as the jury is to determine the facts of
11 this case. You are the sole and exclusive judges of the
12 facts. You alone determine what evidence to accept, how
13 important any evidence is that you do accept, and what
14 conclusions to draw from all of the evidence.

15 You must apply the law as I give it to you to the facts
16 as you determine them to be in order to decide whether the
17 Commonwealth has proved the elements of these charges beyond
18 a reasonable doubt. You should determine the facts based
19 solely on a fair consideration of the evidence.

20 You are to be completely fair and impartial, and you are
21 not to be swayed by prejudice, by sympathy, by personal likes
22 or dislikes towards either side. You are not to allow
23 yourselves to be influenced because the claims are popular or
24 unpopular with the public.

25 You are in search of a verdict. The word "verdict"

1 stems from two Latin words "dictum veritas" meaning to speak
2 the truth.

3 You are not to decide this case based on what you may
4 have read or heard outside of the courtroom. You are not to
5 engage in any guesswork about any unanswered questions that
6 remain on your mind or to speculate about what the real facts
7 might or might not have been.

8 You should not consider anything I have said or done
9 during the trial in ruling on motions or objections or in
10 comments to the attorneys or in setting forth the law in
11 these instructions as any indication of my opinion as to how
12 you should decide this case.

13 If you believe that I have expressed or hinted at any
14 opinion about the facts of this case, please disregard it. I
15 have absolutely no opinion about the facts of this case or
16 what your verdict ought to be. This is solely and
17 exclusively your duty and responsibility. In short, you are
18 to confine your deliberations to the evidence and nothing but
19 the evidence.

20 Now, what is evidence? We touched upon this at the
21 beginning of the case. It consists of two things. It is the
22 testimony of witnesses and the exhibits. You are to decide
23 what the facts are solely from the evidence that's been
24 admitted in this case. You are not to decide the facts based
25 on suspicion or conjecture.

1 Now, in this case, there are, I think, 25 exhibits and
2 you will have all of them in the jury room during your
3 deliberations. You alone will decide the weight; that is,
4 the value that they deserve to receive in helping you to make
5 your ultimate judgment about whether the Commonwealth has met
6 its burden.

7 You are not required to believe something simply because
8 it is written on a piece of paper or appears in a photograph.
9 You are not, of course, required to disbelieve it because it
10 appears there. Whether to believe what an exhibit purports
11 to show and how much weight to give that exhibit is entirely
12 for you to decide.

13 Of course the quality or strength of proof is not
14 determined by the sheer volume of evidence or the number of
15 witnesses or exhibits. It is the weight of the evidence, its
16 strength intending to prove the issue at stake that is
17 important. You might find that a smaller number of witnesses
18 who testified to a particular fact are more believable than a
19 larger number of witnesses who testified to the opposite.

20 Some things that occur during a trial are not evidence
21 and you may not consider them as evidence in deciding the
22 facts of this case. A question put to a witness is never
23 evidence, only the answers are evidence. Also, you may not
24 consider any answer that I struck from the record and told
25 you to disregard. Do not consider such answers.

1 If I sustained an objection; that is, if I did not allow
2 the witness to answer, you are to disregard that question and
3 you must not wonder or guess about what the answer might have
4 been. An unanswered question is not evidence.

5 You may not consider any item that was marked for
6 identification but never received into evidence as an
7 exhibit.

8 I know I've said this a number of times but I repeat
9 myself purposefully. The opening statements and the closing
10 arguments of counsel, they're not evidence. They are not a
11 substitute for evidence. They are only intended to assist
12 you in understanding the evidence and the contentions of the
13 parties.

14 A lawyer's question itself, no matter how artfully or
15 cleverly phrased, is not evidence. A question can only be
16 used to give meaning to a witness's answer. If a question
17 included any suggestions or an insinuation, you are to ignore
18 them unless I permitted the witness to answer and the witness
19 confirmed those suggestions.

20 My instructions and anything I said in passing during
21 the trial are not evidence. If your memory of the testimony
22 differs from that of the attorneys or mine, you are to follow
23 your own recollection. All of this comes down to one simple
24 rule: Testimony comes from witnesses and not from the
25 lawyers.

1 Now, in this case, I did permit you to take notes, and
2 you may refer to your notes during your deliberations.

3 However, your notes are not a substitute for your -- for the
4 actual -- your actual recollection of the testimony of the
5 witnesses.

6 And let me also caution you about something else. We
7 cannot provide a transcript of the testimony of any of the
8 witnesses who testified during the course of this trial. So
9 it is your recollection that you must rely on with respect to
10 determining the credibility or believability of the
11 witnesses.

12 Now, there are two types of evidence that you may use to
13 determine the facts of a case and they are direct evidence
14 and circumstantial evidence. You have direct evidence when a
15 witness testifies about something they saw, heard, or somehow
16 sensed. The only question you must resolve in your mind is
17 whether or not to believe that witness.

18 You have circumstantial evidence where no witness can
19 testify directly about the fact that is to be proved but you
20 are presented with evidence of other facts and then asked to
21 draw reasonable inferences from them about the fact that is
22 to be proved.

23 Let me give you an example. Your spouse or your child
24 or your significant other may tell you one day that they see
25 the mailman at your mailbox. That is direct evidence that

1 the mailman has been to your house.

2 On the other hand, they may tell you only that they see
3 mail in the mailbox. That is circumstantial evidence that
4 the mailman has been there to your house. Nobody has seen
5 him but you can reasonably infer that the mailman has been
6 there because there is mail in the mailbox.

7 Now, I use the phrase "reasonable inference," and I'm
8 now going to define that for you. An inference is a
9 permissible deduction that you may make from evidence that
10 you have accepted as believable. Inferences are things that
11 we do every day. They are little steps in reasoning in which
12 you take some piece of known information, apply your life
13 experience to it, and then draw a conclusion. You may draw
14 an inference, even if it is not necessary or inescapable, so
15 long as it is reasonable and warranted by the evidence.

16 I'm going to give you an example of an inference and use
17 the same mailman/mailbox analogy. If you knew your mailbox
18 was empty when you left home this morning and find mail in it
19 when you go home tonight, you may reasonably and properly
20 infer that the mailman has delivered the mail.

21 Now, obviously you didn't see the mailman deliver the
22 mail because you've been sitting here in court with me, but
23 from the fact that you knew that your mailbox was empty when
24 you left home this morning and you go home tonight and it's
25 filled with catalogs and bills, you can reasonably and

1 properly infer that the mailman has been to your house in the
2 interim to deliver your mail. That is all we mean by an
3 inference.

4 Now, during this case, the parties did enter into a
5 stipulation. I read it to you earlier, and I'm going to
6 reread it to you now. And this is to be taken by you as an
7 undisputed fact:

8 "Items alleged to be controlled substances in this case
9 were seized by the Springfield Police and originally sent to
10 a laboratory in Amherst for testing. These items were sent
11 in October and November of 2011 and tested between December
12 of 2011 and January of 2012 by Sonja Farak, a chemist for the
13 Department of Public Health.

14 "In January of 2013, Ms. Farak was arrested and charged
15 with evidence tampering involving alleged heroin and cocaine.
16 As a result of her pending indictment, Ms. Farak is
17 unavailable to testify in this case and no testimony can or
18 will be offered concerning the results of any testing she may
19 have performed. The Court has found that tampering by Ms.
20 Farak occurred as early as July of 2012."

21 So that is the stipulation that was entered into by the
22 parties at the beginning of this case.

23 As jurors, it will be your duty to decide any disputed
24 questions of fact. You will have to determine which
25 witnesses to believe and how much weight to give their

1 testimony. You should give the testimony of each witness
2 whatever degree of belief and importance that you judge it is
3 fairly entitled to receive.

4 You are the sole judges of the credibility of witnesses,
5 and if there are any conflicts in the testimony, it is your
6 function to resolve those conflicts and to determine where
7 the truth lies.

8 You may believe everything a witness says or only part
9 of it or none of it. If do you do not believe a witness's
10 testimony that something happened, of course your disbelief
11 is not evidence that it did not happen. When you disbelieve
12 a witness, it just means you have to look elsewhere for
13 credible evidence about that issue.

14 In deciding whether to believe a witness and how much
15 importance to give a witness's testimony, you must look at
16 all of the evidence, drawing on your own common sense and
17 life experience. Often it may not be what a witness says but
18 how they say it that might give you a clue whether or not to
19 accept their version of an event as believable.

20 You may consider a witness's character, their appearance
21 and demeanor on the witness stand, their frankness or lack of
22 frankness in testifying, whether their testimony is
23 reasonable or unreasonable, probable or improbable.

24 You may take into account how good an opportunity the
25 witness had to observe the facts about which they testified,

1 the degree of intelligence they show, and whether their
2 memory seems accurate. You may also consider their motive
3 for testifying, whether they display any bias in testifying
4 and whether or not they have an interest in the outcome of
5 the case.

6 Where there are inconsistencies or discrepancies in a
7 witness's testimony or between the testimony of different
8 witnesses, that may or may not cause you to discredit such
9 testimony. Innocent mistakes of memory do happen. Sometimes
10 people forget things or get confused or remember an event
11 differently. In weighing such discrepancies, you should
12 consider do they involve important facts or only minor
13 details, and whether the discrepancies result from innocent
14 lapses of memory or intentional falsehoods.

15 Now, during this case, you may have noticed that the
16 defendant did not testify at this trial. The defendant has
17 an absolute right not to testify since the entire burden of
18 proof in this case is on the Commonwealth to prove that the
19 defendant is guilty. It is not up to this defendant,
20 Mr. Penate, to prove that he is innocent.

21 Under our system of law, a defendant has a perfect right
22 to say to the Commonwealth: You have the burden of proving
23 your case against me beyond a reasonable doubt. I do not
24 have to say a word.

25 The fact that the defendant did not testify has nothing

1 to do with the question of whether he is guilty or not
2 guilty. You are not to draw any adverse inference against
3 the defendant because he did not testify. You are not to
4 consider it in any way or even discuss it during your
5 deliberations.

6 You must determine whether the Commonwealth has proved
7 its case against the defendant based solely on the testimony
8 of the witnesses and the exhibits.

9 Now, you heard questions posed to a witness about
10 statements made on a prior occasion that are allegedly
11 inconsistent with that witness's in-court testimony. There
12 is a limitation to that procedure. Generally, statements
13 made outside of court aren't admissible. We call those
14 hearsay. They are not admissible to say what is said out of
15 court for a number of reasons.

16 However, there are a number of exceptions to that rule.
17 One of those is if a witness made a statement on a prior
18 occasion that is somehow inconsistent with his or her
19 in-court testimony, then the jury is permitted to hear the
20 statement for a limited purpose. The purpose is to determine
21 whether or not that prior inconsistent statement makes the
22 in-court testimony somehow less believable.

23 Bear in mind that proof of what was said on the prior
24 occasion is not being offered to prove the substance of that
25 statement. Instead, it's being offered solely to assist you

1 in weighing that particular witness's believability.

2 It's up to you to determine a couple of things. First,
3 was there a statement made on a prior occasion that's
4 inconsistent? And, second, if there was, does that make the
5 witness less believable to you? That's for you to determine,
6 and that really speaks to the jury's function.

7 During the deliberation process, you're going to have to
8 take about the case, talk about the witnesses, and talk about
9 the testimony. Every jury in one manner or another has to
10 weigh the credibility or the believability of witnesses.

11 Just because I'm a judge, I'm not better equipped in
12 that endeavor than any of you. It is the very ability of a
13 jury to make these decisions that gives strength to our
14 system. So you are to use your common sense in weighing the
15 believability of all of the witnesses who testify in this
16 case.

17 One of the most important issues in this case is the
18 identification of the defendant as the perpetrator of the
19 crime. The Commonwealth has the burden of proving identity
20 beyond a reasonable doubt. It is not essential that the
21 witness himself or herself be free from doubt as to the
22 correctness of his statement.

23 However, you, the jury, must be satisfied beyond a
24 reasonable doubt as to the accuracy of the identification of
25 the defendant before you convict him. If you are not

1 convinced beyond a reasonable doubt that the defendant was
2 the person who committed these crimes, you must find the
3 defendant not guilty.

4 Identification testimony is an expression of belief or
5 impression by the witness. Its value depends on the
6 opportunity the witness had to observe the offender at the
7 time of the events and to make a reliable identification
8 later.

9 In appraising the identification testimony of a witness,
10 there are several things you should consider. The first is
11 whether you are convinced that the witness had the capacity
12 and an adequate opportunity to observe the offender.

13 Whether the witness had an adequate opportunity to
14 observe the offender at the time of the offense will be
15 affected by such matters as how long or short a time was
16 available, how far or close the witness was, how good were
17 lighting conditions, any circumstances that might focus or
18 distract the witness's attention such as the presence of a
19 gun, and whether the witness had occasion to know or see the
20 person in the past.

21 In general, a witness bases any identification he makes
22 on his or her perception through the use of his or her
23 senses. Usually the witness identifies an offender by the
24 sense of sight. However, this is not necessarily so, and he
25 or she may use other senses.

1 The second thing to consider is whether you are
2 satisfied that the identification made by the witness
3 subsequent to the offense was the product of his or her own
4 recollection. You may take into account the circumstances
5 under which the identification was made. If the
6 identification by the witness may have been influenced by the
7 circumstances under which the defendant was presented to the
8 witness for identification, you should scrutinize that
9 identification with great care.

10 You may also consider the length of time that lapsed
11 between the occurrence of the crime and the opportunity of
12 the witness to see and identify the defendant as the offender
13 as a factor bearing on the reliability of the identification.

14 You may also take into account that an identification
15 made by picking the defendant out of a group of similar
16 individuals is generally more reliable than one that results
17 from the presentation of the defendant alone to the witness.

18 You may take into account any occasion in which the
19 witness failed to make an identification of the defendant or
20 made an identification that was inconsistent with his
21 identification at trial.

22 Finally, you must consider the credibility of each
23 identification witness in the same way as any other witness.
24 Consider whether he or she is truthful and whether he had the
25 capacity and the opportunity to make a reliable observation

1 on the matter covered in his testimony.

2 I again emphasize that the burden of proof is on the
3 Commonwealth and that burden extends to every element of the
4 crime charged, and this specifically includes the burden of
5 proving beyond a reasonable doubt the identity of the
6 defendant as the perpetrator of the crime with which he
7 stands charged.

8 If you have a reasonable doubt as to the identification
9 of the defendant as the perpetrator, you must find the
10 defendant not guilty.

11 I am now going to turn to the legal principles that
12 apply in all criminal trials. Those principles are the
13 presumption of innocence, the burden of proof, and the
14 standard of proof beyond a reasonable doubt.

15 In the beginning of this trial I told you that the
16 defendant was presumed innocent and cannot be convicted
17 unless the prosecution proves his guilt beyond a reasonable
18 doubt. That means that no adverse inference can be drawn
19 against this defendant because he was arrested, indicted, and
20 is now on trial.

21 When a case is presented to the Grand Jury, there is a
22 copy of an indictment. An indictment is returned from the
23 Grand Jury. An indictment is a very formal looking document
24 and it's signed by the foreperson of the Grand Jury and an
25 Assistant District Attorney.

1 And we talked about this earlier about how the word
2 "indictment" is a more formal word that we use here in the
3 Superior Court but it's essentially the complaint. Let me
4 remind you, an indictment does not prove a thing in this
5 case. A Grand Jury is very different from a trial jury. A
6 Grand Jury merely accuses a defendant and sets into motion
7 the process that culminates in a trial in front of a jury
8 such as you. So do not draw any adverse inference against
9 the defendant because he was indicted.

10 I also told you at the beginning of the trial that the
11 burden of proof is on the prosecution to prove the
12 defendant's guilt beyond a reasonable doubt. That burden
13 stays with the prosecution throughout the entire trial. It
14 never shifts to the defendant. No defendant has to prove his
15 or her innocence. Rather, the burden of proof is on the
16 Commonwealth to prove the defendant's guilt beyond a
17 reasonable doubt.

18 Now, for years judges have struggled with the proper
19 definition of the term "beyond a reasonable doubt," and I
20 certainly don't have any greater insight into the proper
21 definition of that term. So, my policy is this: I will read
22 to you the definition of the term "beyond a reasonable
23 doubt," and it was developed in a case that was tried here in
24 the Commonwealth in 1850.

25 The name of the case is Commonwealth versus Webster. So

1 I'm going to read the definition of the term "beyond a
2 reasonable doubt" that was developed in this case, but I'm
3 going to read it in its modern syntax.

4 "The burden is on the Commonwealth to prove beyond a
5 reasonable doubt that the defendant is guilty of the charge
6 made against him. What is proof beyond a reasonable doubt?
7 The term is often used and probably pretty well understood
8 though it is not easily defined. Proof beyond a reasonable
9 doubt does not mean proof beyond all possible doubt because
10 everything in the lives of human beings is open to some
11 possible or imaginary doubt.

12 "A charge is proved beyond a reasonable doubt if after
13 you have compared and considered all of the evidence, you
14 have in your minds an abiding conviction to a moral certainty
15 that the charge is true. I have told you that every person
16 is presumed to be innocent until he is proved guilty and that
17 the burden of proof is on the Commonwealth.

18 "If you evaluate all the evidence and you still have a
19 reasonable doubt remaining, the defendant is entitled to the
20 benefit of that doubt and must be acquitted. It is not
21 enough for the Commonwealth to establish a probability, even
22 a strong probability that the defendant is more likely to be
23 guilty than not guilty. That is not enough.

24 "Instead, the evidence must convince you of the
25 defendant's guilt to a reasonable and moral certainty, a

1 certainty that convinces your understanding and satisfies
2 your reason and judgment as jurors who are sworn to act
3 conscientiously on the evidence. That is what we mean by
4 proof beyond a reasonable doubt."

5 Now, it doesn't mean that everything that's been
6 presented during this trial must be proved to that standard.
7 It is the elements of the crimes charged which I will now
8 define which must be proved to that standard.

9 In this case, the defendant is charged with two counts
10 of possession with the intent to distribute a controlled
11 substance. Count 1 alleges that the defendant possessed a
12 Class B substance with the intent to distribute it, and Count
13 3 alleges that the defendant possessed a Class A substance
14 with the intent to distribute it.

15 These are the substances that were allegedly found in
16 the dog pen in the apartment. The defendant is not charged
17 with possessing any other controlled substances with the
18 intent to distribute them.

19 Our state legislature has specifically defined
20 possession with intent to distribute in a statute, and it's
21 found in General Laws 94C, Section 32 through 32D. The
22 pertinent parts of the statute read as follows:

23 Any person who knowingly or intentionally possesses with
24 intent to distribute a controlled substance shall be
25 punished. In order to prove the defendant guilty of

1 possession with the intent to distribute a controlled
2 substance, the Commonwealth must prove four elements beyond a
3 reasonable doubt.

4 First, that the defendant possessed a certain substance.

5 The second element, that the substance was a controlled
6 substance; namely, with respect to Count 1, cocaine, and with
7 respect to Count 2, heroin.

8 The third element is that the defendant possessed that
9 controlled substance knowingly or intentionally.

10 And, fourth, that the defendant had the specific intent
11 to distribute the controlled substance.

12 The first element that the Commonwealth must prove
13 beyond a reasonable doubt is that the defendant possessed a
14 controlled substance. The law recognizes two types of
15 possession; actual possession and constructive possession.

16 A person that has physical control over an object and
17 has the intent to exercise such control is in actual
18 possession of it. A person who knowingly has direct physical
19 control over an object at a given time is then in actual
20 possession of it.

21 Actual possession implies control and power over the
22 thing or object. For example, I've got this pencil in my
23 hand. I know it's a pencil. I can do anything I want with
24 it. Clearly, I have actual control over this pencil.

25 Possession does not depend on the length of time one has

1 an object in his or her control. Fleeting, momentary contact
2 with an object may constitute actual possession if at the
3 time of contact with the object a person has the control and
4 power to do with it what he or she wills.

5 Constructive possession is the other type of possession
6 recognized by the law. A person who, although not in actual
7 possession, knowingly has both the power and the intention at
8 any given time to exercise dominion, power, or control over
9 an object either directly or through another person or
10 persons is in constructive possession of the object.

11 Thus, constructive possession means knowledge of the
12 location of an object combined with the ability and intention
13 to exercise dominion and control over it. For example, I am
14 in constructive possession of my car keys which are in my
15 purse which is in my lobby.

16 To be in possession of an object, a person does not have
17 to own the object. Mere presence in the vicinity of a
18 controlled substance or mere knowledge of its physical
19 location is not, however, the equivalent of possession. As
20 I've said to you, the term constructive possession means that
21 a person has knowledge of the location of the object and the
22 ability and the intention to exercise control and power over
23 it.

24 Possession, whether actual or constructive, need not be
25 exclusive. It may be joint or shared between or among more

1 than one person. Possession may be proved by circumstantial
2 evidence and the reasonable inferences drawn from that
3 evidence. Whether such an inference is reasonable in this
4 case depends on all the circumstances and is for you to
5 determine.

6 The second element the Commonwealth must prove beyond a
7 reasonable doubt is that the substance that the defendant
8 possessed was a controlled substance. With respect to Count
9 1, that would be cocaine. With respect to Count 3, a Class A
10 substance heroin.

11 As a matter of law, cocaine is a controlled substance as
12 defined in Class B as defined in our General Laws. As a
13 matter of law, heroin is a controlled substance as defined
14 in -- in Class A as defined in our General Laws.

15 The Commonwealth must therefore prove to you beyond a
16 reasonable doubt that the substance that the defendant
17 allegedly possessed was, in fact, cocaine with respect to
18 Count 1 and heroin with respect to Count 3.

19 The statute defining possession with intent of
20 controlled substance -- the statute defining possession with
21 intent to distribute a controlled substance does not require
22 that the substance be in pure form. Any mixture that
23 includes a controlled substance will suffice.

24 In your evaluation of whether the substance the
25 defendant allegedly possessed was a controlled substance, you

1 may consider all the relevant evidence in the case, including
2 any witness who may have testified either to support or deny
3 the allegation that the substance in question was either
4 cocaine with respect to Count 1 or heroin with respect to
5 Count 3. You may also consider the testimony of experienced
6 police officers, qualified chemists, or other relevant
7 evidence.

8 Bear in mind, the Commonwealth must prove beyond a
9 reasonable doubt that the substance was, in fact, with
10 respect to Count 1, cocaine, and with respect to Count 3,
11 heroin.

12 The third element the Commonwealth must prove beyond a
13 reasonable doubt is that the defendant possessed a controlled
14 substance knowingly and intentionally. As to the knowledge
15 requirement, the Commonwealth must prove beyond a reasonable
16 doubt that the defendant knew that the substance in his
17 possession was a controlled substance.

18 However, the Commonwealth does not have to prove the
19 defendant knew the exact nature of the substance. It is
20 sufficient if the Commonwealth proves beyond a reasonable
21 doubt that the defendant was aware that he possessed some
22 sort of a controlled substance.

23 The Commonwealth must also prove beyond a reasonable
24 doubt that the defendant had consciously, voluntarily, and
25 purposefully possessed the controlled substance. A person's

1 knowledge, like his or her intent, is a matter of fact that
2 may or may not be susceptible to proof by direct evidence.

3 If it is not susceptible to proof by direct evidence,
4 then the Commonwealth may prove knowledge by circumstantial
5 evidence and the inferences reasonably drawn from that
6 evidence.

7 The fourth element the Commonwealth must prove beyond a
8 reasonable doubt is that the defendant had the specific
9 intent to distribute the controlled substance in his
10 possession. In other words, that the defendant actually
11 intended to distribute the controlled substance.

12 Intent refers to a person's objective or purpose.
13 Specific intent, which is what is required in this case, is
14 the act of concentrating or focusing the mind for some
15 perceptible period. It is a conscious act with the
16 determination of the mind to do an act. It is contemplation
17 rather than reflex and it must precede that act.

18 The Commonwealth must prove specific intent on the part
19 of the defendant. This requires you to make a decision about
20 the defendant's state of mind at the time of the crime. In
21 this case, you may or may not infer the defendant's intent by
22 considering all the facts as well as evidence of the
23 defendant's conduct offered during the trial.

24 You should consider all of the evidence and any
25 reasonable inferences that you draw from the evidence in

1 determining whether the Commonwealth has proved beyond a
2 reasonable doubt, as it must, that the defendant acted with
3 the specific intent to distribute the cocaine and the heroin.

4 Again, in this case, the Commonwealth must prove that
5 the defendant had the specific intent to distribute the
6 controlled substance. The word "distribute" includes all
7 forms of physical transfer. It is unlawful for a person to
8 even make a gift of a controlled substance.

9 To distribute means what the word commonly or usually
10 means. It means to hand over to another, to give away, or to
11 transfer possession from one person to another. It is
12 irrelevant whether money, property, or some other sort of
13 compensation was involved.

14 The Commonwealth does not have to prove an actual sale
15 but it must prove that this defendant specifically had it in
16 his mind that he was going to distribute; that is, to
17 transfer possession of some portion of this controlled
18 substance to another person. The Commonwealth need not prove
19 the defendant specifically intended to distribute all of it.

20 However, bear in mind, as to this element that the
21 Commonwealth must prove that the defendant did not possess
22 the controlled substance solely for his own use or
23 consumption but instead intended to distribute it to others.

24 Now, here again, a person's intent or state of mind is a
25 matter of fact. Absent other direct evidence, the

1 Commonwealth may resort to proof by inference reasonably
2 drawn from all the facts and circumstances developed at
3 trial. You must determine whether such an inference is
4 reasonable in this case.

5 An inference of an intent to distribute may be drawn
6 from evidence such as possession of a large quantity of
7 drugs, the amount of which would be inconsistent with
8 personal use, the exceptional purity of the drugs, the way in
9 which the drugs were packaged, the confiscation of large
10 amounts of unexplained money, the possession of drug
11 processing equipment such as cutting powder, calibrated
12 scales, testing kits, cigarette papers, and glassine
13 envelopes, or empty capsules to be filled with narcotic
14 powder, the possession of notations indicating the selling of
15 drugs, repeated travel to drug distribution centers, and
16 sophisticated sales arrangements and clandestine methods. It
17 is for you to decide whether such an inference is reasonable
18 here.

19 So, if after considering all the evidence you determine
20 that the Commonwealth has proved beyond a reasonable doubt
21 each of the four elements that I have just defined; that is,
22 that the defendant knowingly or intentionally possessed a
23 controlled substance with the specific intent to distribute
24 it, then you should shall find the defendant guilty of
25 possession of a Class B substance, cocaine, with the intent

1 to distribute it, and that refers to Count 1.

2 If, however, after your consideration of all the
3 evidence you find the Commonwealth has not proved any of the
4 four elements of possession of a controlled substance with
5 the intent to distribute it beyond a reasonable doubt, then
6 you shall find the defendant not guilty of possession of a
7 Class B substance with the intent to distribute it.

8 With respect to Count 3, if after considering all the
9 evidence you determine that the Commonwealth has proved
10 beyond a reasonable doubt each of the four elements that I've
11 just defined; that is, that the defendant knowingly or
12 intentionally possessed a controlled substance with the
13 specific intent to distribute, then you shall find the
14 defendant guilty of possession of a Class A substance,
15 heroin, with the intent to distribute it.

16 If, however, after your consideration of all the
17 evidence you find the Commonwealth has not proved any one of
18 the four elements of possession of a controlled substance
19 with the intent to distribute it beyond a reasonable doubt,
20 then you shall find the defendant not guilty of possession of
21 a Class A substance with the intent to distribute it.

22 Now, in this case, the defendant is charged with
23 unlawful distribution of a controlled substance, a Class A
24 substance, heroin, on three separate occasions, on three
25 separate dates. Those dates are October 21, November 9,

1 November 15, 2011.

2 Our state legislature has specifically defined
3 distribution of a controlled substance in a statute. The
4 relevant portions of the statute read as follows: Any person
5 who knowingly or intentionally distributes a controlled
6 substance in Class A of Section 31 shall be punished.

7 In order to prove the defendant guilty of distribution
8 of a controlled substance, the Commonwealth must prove three
9 elements beyond a reasonable doubt.

10 First, that the substance in question is a controlled
11 substance.

12 Second, that the defendant distributed some perceptible
13 amount of that substance to another person or persons.

14 And, third, that the defendant did so knowingly or
15 intentionally.

16 The first element the Commonwealth must prove beyond a
17 reasonable doubt is that the powder that the defendant
18 allegedly distributed was a controlled substance, in this
19 case, heroin, a Class A controlled substance. As a matter of
20 law, heroin is a controlled substance in Class A as defined
21 in our General Laws.

22 Now, this first element is the same as the first element
23 in the first charge that I just read to you, but I'm going to
24 read it again. I will read it again.

25 The Commonwealth must, therefore, prove to you beyond a

1 reasonable doubt that the substance the defendant allegedly
2 distributed was, in fact, heroin. The statute defining
3 distribution does not require that the substance be in pure
4 form. Any mixture will suffice.

5 In your evaluation of whether the substance the
6 defendant allegedly possessed was a controlled substance, you
7 may consider all the relevant evidence in the case, including
8 any witness who may have testified either to support or deny
9 the allegation that the substance in question was heroin.

10 You may also consider the testimony of experienced
11 police officers, qualified chemists, and other relevant
12 evidence. Bear in mind, the Commonwealth must prove beyond a
13 reasonable doubt that the substance was, in fact, heroin.

14 The second element the Commonwealth must prove beyond a
15 reasonable doubt is that the defendant distributed some
16 perceptible amount of that substance to another person or
17 persons.

18 The term "distribute" means to actually deliver a
19 controlled substance to another person other than by legally
20 administering or dispensing it. Deliver, in turn, is a
21 transfer of a controlled substance from one person to
22 another. Distribution includes all forms of physical
23 transfer. For example, it is unlawful for a person even to
24 make a gift of a controlled substance.

25 To distribute means what the word commonly or usually

1 means; to hand over to another, to give away, or to transfer
2 ownership from one person to another.

3 The third element the Commonwealth must prove beyond a
4 reasonable doubt is that the defendant not only distributed a
5 Class A controlled substance, but that he did so knowingly or
6 intentionally. Intent refers to a person's objective or
7 purpose. You may find that the defendant acted knowingly or
8 intentionally if he did so consciously, voluntarily, and
9 purposefully.

10 A person's knowledge and his or her intent is a matter
11 of fact that may or may not be susceptible to proof by direct
12 evidence. If it is not susceptible to proof by direct
13 evidence, then you may resort to proof by circumstantial
14 evidence and the inferences reasonably drawn from that
15 evidence.

16 If after considering all of the evidence you find that
17 the Commonwealth has proved beyond a reasonable doubt each of
18 the three elements I have just defined; that is, that the
19 substance at issue here is a controlled substance, that the
20 defendant distributed it, and that the defendant did so
21 knowingly or intentionally, then you shall find the defendant
22 guilty of distribution of a controlled substance.

23 If, however, after your consideration, you find that the
24 Commonwealth has not proved any one of the three elements of
25 distribution of a controlled substance that I just defined

1 beyond a reasonable doubt, then you shall find the defendant
2 not guilty of distribution of a controlled substance.

3 Now, with regards to Count 7, and Count 7 only, and that
4 is a charge -- a count alleging distribution of a Class A
5 substance on November 9th of 2011, the Commonwealth, with
6 respect to that count only, is proceeding on a theory of
7 joint venture.

8 The Commonwealth alleges that although the defendant did
9 not sell the Class A substance directly to Officer Hernandez,
10 he aided and abetted in the commission of this offense by
11 directing another person to sell to Officer Hernandez.

12 A defendant knowingly participates in the commission of
13 an offense if he intentionally participates in some
14 meaningful way in the commission of the offense with the
15 intent required to commit the offense.

16 Such participation may take any one of several forms.
17 It may take the form of personally committing the acts that
18 constitute the crimes or of aiding or assisting another in
19 those acts. It may take the form of asking or encouraging
20 another person to commit the crime or helping to plan the
21 commission of the crime.

22 Alternatively, it may take the form of agreeing to stand
23 by, at, or near the scene of the crime to act as a lookout or
24 to provide aid or assistance in committing the crime or in
25 escaping if such help becomes necessary.

1 The agreement to help if needed does not need to be made
2 through a formal or explicit written or oral advanced plan or
3 agreement. It is enough consciously to act together before
4 or during the crime with the intent of making the crime
5 succeed.

6 The Commonwealth must also prove beyond a reasonable
7 doubt that at the time the defendant knowingly participated
8 in the commission of the crime charged, and that would be the
9 November 7th -- November 9th, Count 7 crime, he had or shared
10 the intent required for that crime.

11 You are permitted but not required to infer the
12 defendant's mental state or intent from his knowledge of the
13 circumstances or any subsequent participation in the crime.
14 The inferences you draw must be reasonable and you may rely
15 on your experience and common sense in determining the
16 defendant's knowledge and intent.

17 Mere knowledge that a crime is to be committed is not
18 sufficient to convict the defendant. The Commonwealth must
19 also prove more than mere association with the perpetrator of
20 the crime either before or after its commission. He must
21 also prove more than a mere failure to take appropriate steps
22 to prevent the commission of the crime.

23 Mere presence at the scene of the crime is not enough to
24 find a defendant guilty. Presence alone does not establish a
25 defendant's knowing participation in the crime, even if a

1 person knew about the intended crime in advance and took no
2 steps to prevent it.

3 To find the defendant guilty, there must be proof that
4 the defendant intentionally participated in some fashion in
5 committing that particular crime and had or shared the intent
6 required to commit the crime. It is not enough to show that
7 the defendant was present when the crime was committed or
8 that he knew about it in advance.

9 So that's my instructions with respect to joint venture
10 which applies only to Count 7, and that would be the
11 November -- the allegations with respect to the November 9th
12 incident.

13 That, ladies and gentlemen, concludes my instructions to
14 you.

15 May I please see counsel at sidebar before we proceed.
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1 (Sidebar conference concluded)

2 THE COURT: Commonwealth satisfied?

3 MR. VELAZQUEZ: Yes, Your Honor.

4 THE COURT: Defense?

5 MR. RYAN: Defendant would just object for the record to
6 the giving of the model instructions. I don't wish to be
7 heard any further on that.

8 THE COURT: On identification?

9 MR. RYAN: Yes.

10 THE COURT: The objection is noted.

11 MR. RYAN: Thank you.

12 (Sidebar conference concluded)

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1 THE COURT: Okay. You know, we started out with 14
2 jurors, we're now down to 13, and I did tell you at the
3 beginning of the case that only 12 of you can deliberate.
4 So, I am going to ask Mr. -- first let me select the
5 foreperson. That's pretty important. Mr. Ginley.

6 (Discussion was held off the record between the Court and
7 clerk)

8 THE CLERK: Shevon Rosa in seat No. 4, you've been
9 selected as a jury foreperson.

10 THE COURT: Ms. Rosa, it doesn't mean you're going to
11 get paid any more than your fellow jurors, and your word
12 doesn't carry any greater weight than your fellow jurors.
13 I'll explain to you what your responsibilities are as soon as
14 the jury is reduced.

15 FOREPERSON: Okay.

16 THE CLERK: Juror in seat No. 9, Adam Gullucci, please
17 step down having been selected as an alternate.

18 THE COURT: Okay. So, Ms. Rosa, your responsibility is
19 to act like the chairperson of a board. Everybody has an
20 equal say or equal voice in this process, and make sure that
21 everybody has an opportunity to be heard.

22 Your other responsibility is to sign and date the
23 verdict slip, and it's pretty self-explanatory. Each count
24 of the indictment should be considered separately, must be
25 considered separately. And we need a unanimous verdict with

1 respect to all counts of the indictment.

2 So with respect to Count 1, the defendant can either be
3 found not guilty or guilty. You are to sign and date the
4 verdict slip in pen. Use ink.

5 In the event that you have any questions, please write
6 them on a piece of paper, give them to the court officer, and
7 they will give them to me. I will read it and share it with
8 counsel. If it's appropriate for me to answer your question,
9 I will do so. If it isn't, I will tell you that and I won't
10 answer the question.

11 You will be receiving the exhibits shortly and feel free
12 to go through the exhibits.

13 (Court officers sworn)

14 THE COURT: Ladies and gentlemen, all we ask is that
15 your verdict be the result of integrity and principle. Your
16 verdict should be the result of a careful consideration of
17 all of the evidence that's been admitted during the course of
18 this trial. Everyone who comes to court stands equal before
19 the bar of justice. So your verdict should be based on the
20 evidence that you heard during the course of this trial and
21 the law as I have defined it for you.

22 Ladies and gentlemen, you may begin your deliberations.

23 (The jury leaves the courtroom)

24 THE CLERK: Counsel, step forward and review the verdict
25 slips and the exhibits for the record.

1 (Pause in proceedings)

2 MR. VELAZQUEZ: For the record, the Commonwealth is
3 satisfied with the verdict slips.

4 MR. RYAN: For the record, the defendant is satisfied
5 with the verdict slips.

6 THE COURT: Thank you. Now the exhibits.

7 (Pause in proceedings)

8 MR. VELAZQUEZ: Your Honor, can we remove the evidence
9 tag from Exhibit No. 22?

10 THE COURT: Sure.

11 MR. VELAZQUEZ: It's just a handwritten evidence tag.

12 THE COURT: It says "school zone."

13 MR. RYAN: Right. It's by agreement.

14 THE COURT: Nothing else is on it?

15 MR. VELAZQUEZ: We've already redacted what was on there
16 and that seems to be fine the way it is.

17 THE CLERK: And 24, 25, and 26, Your Honor, had been
18 removed. 26A are the IDs.

19 THE COURT: Okay.

20 MR. VELAZQUEZ: Commonwealth is satisfied.

21 MR. RYAN: The defendant is satisfied.

22 THE COURT: Thank you. Interesting case, gentlemen.

23 MR. RYAN: Thank you, Your Honor.

24 (Court recessed at 11:40 a.m.)

25 (Court reconvened at 4:01 p.m.)

1 THE COURT: I have received a note from the foreperson
2 and it reads, "We cannot come to a conclusion and come up
3 with a verdict."

4 So, my recollection, with the help of Mr. Ginley, is
5 that the jurors went out at about 11:30.

6 THE CLERK: That's correct, Your Honor. 11:20 or so.

7 THE COURT: I alerted you to the fact that I'm not
8 available tomorrow. It's now four o'clock. I will entertain
9 any suggestions from counsel. Mr. Velazquez.

10 MR. VELAZQUEZ: If you want to give them a charge at
11 this point, the Tuey-Rodriguez charge.

12 THE COURT: Well, I think it's a little pre -- what do
13 you think, Mr. Ryan?

14 MR. RYAN: It sounds a little premature to me.

15 THE COURT: Technically I think I should tell them you
16 went out at 11:30, it is 4:00 and getting late, but please
17 attempt to resolve the matter, and then give them an
18 opportunity to resolve it and then Tuey them. I think that's
19 procedurally how it should be done.

20 MR. VELAZQUEZ: Sure.

21 THE COURT: So, Mr. Ryan.

22 MR. RYAN: I agree with the Court. I don't know if you
23 want to talk about "what ifs," but I think that's the way to
24 proceed with the question.

25 THE COURT: But the other thing is this: I could tell

1 them that --

2 THE DEFENDANT: Can I talk to my lawyer?

3 THE COURT: Certainly. You know what? I'll go -- do
4 you want me to go outside?

5 MR. RYAN: If that would be okay. Thank you, Your
6 Honor.

7 (Court recessed at 4:03 p.m.)

8 (Court reconvened at 4:06 p.m.)

9 THE COURT: Did you have enough time to talk to your
10 client?

11 MR. RYAN: We did. Thank you for giving us that
12 consideration. We're ready to proceed.

13 THE DEFENDANT: Thank you.

14 THE COURT: You're welcome. I don't remember where I
15 was, but I can tell them -- ask them to go back out or just
16 tell them they have to come back Monday.

17 MR. RYAN: May I ask how late was the Court, if there
18 had been no question, how late is the Court inclined --

19 THE COURT: I usually send in a note at 4 or 4:15.

20 MR. RYAN: I guess my feeling is I would prefer to use
21 up whatever time is left today, if just coming into the court
22 causes them to have any movement, but I think it probably
23 would be helpful also to find out -- I don't think they were
24 anticipating coming back next week. I don't know if we're
25 going to be in trouble with alternates and all that sort of

1 thing too.

2 MR. VELAZQUEZ: Your Honor, after the trial began, I
3 learned something about one of the jurors that I was not
4 aware of, and I suspect that there may be some issues with
5 that particular juror.

6 I will tell the Court that Melvin Jones is somebody who
7 indicated to the Court that he had some prior involvement,
8 one traffic case or something like that, and I asked about
9 that.

10 But I've since learned that apparently his son was
11 arrested on more than one occasion by these same police
12 officers. And there was no indication that he may harbor
13 some ill will towards them, and it was not something that was
14 ever explored --

15 THE COURT: When did you find out all of this
16 information?

17 MR. VELAZQUEZ: Well, I found out that this person's
18 name is Melvin Jones and so I looked it up after the trial.
19 After we impaneled.

20 THE COURT: And what is it you want me to do about that?

21 MR. VELAZQUEZ: Well, there is a serious question as to
22 whether or not this is a hung jury, that maybe he would be
23 one person who is holding up the process.

24 THE COURT: Well, you know, Mr. Velazquez, A, that's
25 something you should have brought to the Court's attention as

1 soon as you found out about it, and it seems to me it's a
2 little late in the game for us to be concerned about that.
3 The witness -- the juror indicated that he did not give any
4 indication as to whether he knew any of the witnesses, the
5 police witnesses.

6 MR. VELAZQUEZ: Yes.

7 THE COURT: I don't know how long ago this arrest
8 occurred. He may not even -- I don't know what kind of
9 relationship he has with his son and whether he was involved
10 in his criminal matters, whether he even came to court with
11 his son.

12 MR. VELAZQUEZ: I just brought it to the Court's
13 attention. I think that may be a live issue, but if it's not
14 something the Court is willing to address, I understand.

15 THE COURT: So am I hearing that you want me to call
16 this juror and question him about whether he could be -- this
17 deliberating juror whether he can be a fair and impartial
18 juror?

19 MR. VELAZQUEZ: Well, there is one alternate still left
20 at this point and it might be an option for the Court if that
21 is the case. I don't know this to be true, but I think it's
22 my duty to inform the Court of what I have learned since this
23 trial started.

24 THE COURT: I think it -- I agree with you. I think it
25 was your duty to inform the Court about it before he became a

1 deliberating juror.

2 If we could have the jurors brought in, please. I am
3 going to just chat with them, explain that it's late, and ask
4 if they would go back for another couple of minutes to resume
5 their deliberations.

6 This will be marked as J for ID.

7 (The clerk marks the jury communication as J for
8 identification)

9 (The jury enters the courtroom)

10 THE COURT: Okay, Madam Foreperson and members of the
11 jury, I did receive your note and it reads, "We cannot come
12 to a conclusion and come up with a verdict."

13 I know it's probably been a relatively long day for you,
14 but what I'm going to do is ask you to all take a deep breath
15 and exhale. Okay. It's ten after four. I am going to
16 implore you and ask you to go back to your deliberation room
17 and talk about this case. And please talk about the case.
18 Do your best and listen to everybody's opinion with respect
19 to the case. Okay? All right. If you want to stand up and
20 stretch, feel free to do so.

21 Please resume your -- do you want to stay in here for a
22 minute and just work out the kinks?

23 (Laughter)

24 FOREPERSON: Do you want to come in there with us?

25 (Laughter)

1 THE COURT: Let me just share this with you. So,
2 normally you'd come back tomorrow. I'm not available
3 tomorrow. So if you think it's best, you may need to take
4 time away, time off. You'd have to come back on Monday and
5 conclude your deliberations, which it's really up to you.

6 I am going to ask that you go back, just talk for a
7 couple of minutes. We're here, and it's okay. It's okay.
8 If we have to come back on Monday, it really is okay.

9 So, please, you may resume your deliberations, ladies
10 and gentlemen. And I'll send in a note in a while or you can
11 just knock on the door and let Donald know whether or not
12 you've reached an agreement. If not, that's fine. We'll
13 just come back on Monday. Thank you.

14 ALTERNATE JUROR: Your Honor, may I have a word, please?

15 THE COURT: No. Just follow. Thank you.

16 (The jury leaves the courtroom)

17 THE COURT: I just didn't feel comfortable not telling
18 them about my day so I just blurted it out. I'll wait -- I
19 think the alternate may want to have a few words with us.

20 (Pause in proceedings)

21 THE COURT: Did the alternate need to see me?

22 COURT OFFICER: I didn't even ask him. Do you want me
23 to ask him?

24 THE COURT: Please.

25 (Pause in proceedings)

1 COURT OFFICER: Your Honor, the alternate.

2 ALTERNATE JUROR: Thank you, Your Honor.

3 THE COURT: You're welcome. I just didn't want you to
4 blurt anything out --

5 ALTERNATE JUROR: Oh, of course.

6 THE COURT: -- in front of the deliberating jury. Yes,
7 sir. Your name again?

8 ALTERNATE JUROR: I'm sorry. My name is Adam Gullucci.
9 I'm just requesting if I could be excused for the day. I
10 have a cell phone and I'm immediately available if you need
11 me.

12 THE COURT: I so appreciate that. I really do. But I
13 must ask that you stay. Okay? I don't think it will be too
14 much longer.

15 ALTERNATE JUROR: Okay.

16 THE COURT: But you have to stay.

17 ALTERNATE JUROR: Okay. That's all. Thank you for your
18 consideration.

19 THE COURT: You're more than welcome, sir.

20 (Court recessed at 4:12 p.m.)

21 (Court reconvened at 4:37 p.m.)

22 (Defendant not present)

23 THE COURT: Okay. I know the defendant is not here.
24 The question from Madam Foreperson was they want a new
25 verdict slip on Count 1. Do you have a problem with me

1 giving it to her? It says the same thing.

2 Do you want your defendant present or will you waive his
3 presence just for this?

4 MR. RYAN: I'll waive his presence just for this.

5 THE COURT: And so, Mr. Norris, if you would kindly give
6 this to the jurors. All right?

7 THE CLERK: K for ID, Your Honor.

8 THE COURT: Yes.

9 (The clerk marks the jury communication as K for
10 identification)

11 (Court recessed at 4:37 p.m.)

12 (Court reconvened at 5:05 p.m.)

13 THE COURT: At five of five I sent the jurors a note and
14 I said, "If you wish, you may continue your deliberations
15 tomorrow." And the response was, "Please, please allow us
16 ten more minutes. We're almost there."

17 This will be marked as the next --

18 THE CLERK: L or ID, Your Honor.

19 (The clerk marks the jury communication as L for
20 identification)

21 THE COURT: I just hope they want to come back tomorrow.

22 MR. RYAN: Tomorrow, tomorrow?

23 THE COURT: Tomorrow, tomorrow. I will be here
24 tomorrow.

25 MR. RYAN: So will we.

1 THE COURT: All right.

2 (Court recessed at 5:07 p.m.)

3 (Court reconvened at 5:28 p.m.)

4 (The jury enters the courtroom)

5 THE COURT: All right, ladies and gentlemen. It is now
6 5:30. My understanding is you want to come back tomorrow; is
7 that correct?

8 A JUROR: (Inaudible.)

9 THE COURT: I'm sorry. I didn't hear what you said, and
10 I don't know if I want to hear what you said.

11 (Laughter)

12 THE COURT: I will give you the following instruction:
13 Please, you must not discuss the case with anybody outside of
14 the courtroom, all right? We will begin tomorrow at 9:15 and
15 there will be coffee for you. But if some of you get here
16 before others, don't begin deliberating until you all come
17 back into the courtroom as a group and I excuse you for
18 purposes of resuming your deliberations, all right?

19 Do not do any independent research with respect to any
20 of the issues that have developed during the course of this
21 trial. Please ignore any media attention that has been paid
22 to the case. And in the event you see anyone involved in the
23 case outside of the courtroom, please do not approach them.

24 Enjoy the evening, get some rest, and I'll see you
25 tomorrow morning. Thank you very much.

1 (The jury leaves the courtroom)

2 (Court adjourned at 5:30 p.m.)

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